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THE LAW OF TREASON.—Prosecutions for treason have been few for many years and the very name has lain dormant for half a century or more until resurrected by recent events. As the crime is the highest known to the law and always tends powerfully to excite and agitate the popular mind, the framers of the Constitution deemed it safest to define and limit the offense in the fundamental document itself.[1]

> "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The terms here used were borrowed mainly from the famous English statute, passed at the instigation of the crown under the ancient common law, in the reign of Edward III (1352), on account of the multitude of treasons that had arisen by arbitrary judicial construction. The language of the statute was weighed, interpreted and glossed by successive generations of English judges and commentators, and the meaning was well settled at the time the Constitution was adopted.

The question of what constitutes "levying war" against the United States, came up in the Supreme Court, for the first time, on a motion for writs of *certiorari* to review the proceedings of the Circuit

[1] Art. III, § 3.

Court in *Ex parte Bollman* and *Ex parte Swartwout*,[2] the accused being emissaries of Aaron Burr in his alleged treasonable plans. Speaking through Chief Justice Marshall, the court held that to complete the crime of levying war, there must be an actual assemblage of men for the purpose of effecting by force a treasonable design; but that all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. In the case before the court, a design to overturn the federal government in New Orleans by force would unquestionably have been a design which, if carried into execution, would have amounted to treason; but no mere consultation or conspiracy for this object; no enlisting of men, uncombined with an attempt to effect it, would be an act of levying war. Some actual force or violence must be used in pursuance of the design, though the *quantum* of force is immaterial. There need not be military array or weapons; numbers alone may supply the requisite force. These principles were shortly afterwards discussed at large and reaffirmed by the Chief Justice sitting on circuit in the case of *U. S.* v. *Aaron Burr*,[3] and his language has become crystallized in the general law on this branch of the subject.

But levying war is not only making war for the purpose of entirely overthrowing the government. It includes, as well, an assembling of men, acting in forcible opposition to any law of the United States, pursuant to a common design to prevent the execution of that law in all cases, or in any case within their reach, under any pretense of its being unequal, burdensome, oppressive, or unconstitutional.[4] It is not enough if the intention be merely to defeat the operation of the law in a particular instance, or through the agency of a particular officer, for some private or personal motive; the object of the resistance must be of a public and general character.[5] On the other hand, if the object be to prevent the execution of one or more of the laws of a particular state, but without any intention to intermeddle with the relations of that state with the national government, or to displace the national laws or sovereignty therein, that is treason against the state only.[6]

What constitutes an "overt act" under the second branch of the definition, namely, giving aid and comfort (adhering) to the enemy, is more difficult. The question will necessarily depend very much upon the facts and circumstances of each particular case; but obviously the act must always be of a character susceptible of clear proof and not resting on mere inference, conjecture or suspicion. In general, it has been held that when war exists, any act clearly

[2] 2 Curtis (U. S.) 23, 4 Cranch 75.
[3] Fed. Cas. 14,693.
[4] Case of Fries, Fed. Cas. 5,127.
[5] U. S. *v.* Hoxie, Fed. Cas. 15, 407.
[6] Story, J., Charge, Fed. Cas. 18, 275; People *v.* Lynch, 11 Johns. (N. Y.) 549.

indicating a want of loyalty to the government, and sympathy with its enemies, and which by fair construction is directly in furtherance of their hostile designs, renders the enemy aid and comfort; or if this be the natural consequence of the act, if successful, it is treasonable in its character.[7] Every act which in regard to a domestic rebellion would make the party guilty of levying war, would, in regard to a foreign power with which the United States is at war, constitute "adhering to their enemies." [8]

Some acts leave little or no room for doubt, such as, the communication of intelligence to the enemy by letter, telegraph or otherwise, relating to the strength, movements or position of the army; furnishing arms, troops, munitions, etc., and sending money and provisions, or obtaining credits, all with intent to aid the enemy in his acts of hostility.[9] The destruction of munitions and supplies designed for the army in the field would seem unquestionably to belong to the same category, for the aid is none the less effectual though it is indirect. War is necessarily a trial of strength between the belligerents, and whatever weakens one gives corresponding advantage to the other. It makes no difference whether or not the enterprise commenced shall be successful and actually render assistance. The bare sending of intelligence, for example, which is usually the most valuable aid that can be given, will make a man a traitor even though the intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended.[10]

Mere expressions of opinion, however, indicative of sympathy with the public enemy, will not in themselves constitute an overt act, although when uttered in relation to an act which, if committed with a treasonable design, might amount to such overt act, they are admissible as evidence tending to characterize it and to show the intent with which the act was committed; and they may also furnish some evidence of the act itself against the accused. But this is the extent to which such publications or utterances may be used, either in finding a bill of indictment or on the trial of it.[11] So also, felonious intent being essential, it is competent to show that, some time before the event, facts had occurred and rumors were prevalent in the neighborhood which would explain certain particulars relied on to show a treasonable intent and put the burden on the accused of showing a different one.[12]

In treason there are no accessories. All persons who counsel and incite others to subvert the government or resist the law by force, or to give aid and comfort to the enemy, are in contemplation of law principals, although they may not themselves directly

[7] Leavitt, J., Charge, Fed. Cas. 18, 272.
[8] U. S. *v.* Greathouse, Fed. Cas. 15, 254.
[9] Nelson, J., Charge, Fed. Cas. 18, 271.
[10] U. S. *v.* Greathouse, *supra.*
[11] Nelson, J., Charge, *supra.*
[12] U. S. *v.* Hanway, Fed. Cas 15, 299.

participate in or be actually present at the immediate scene of violence; for successfully to instigate treason is to commit it.[13] No plea of compulsion will excuse a treasonable act unless it were done under an immediate and well-founded fear of death or grievous bodily harm. Mere apprehension of any loss of property, or of slight or remote injury to the person, is not enough.[14]

In legislating on the subject, Congress has provided that "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason," [15] punishable by death or, at the discretion of the court, by imprisonment for not less than five years, coupled with a fine of not less than ten thousand dollars and incapacity to hold any office under the United States.[16] The words, "owing allegiance to the United States," are here entirely surplusage and do not in the slightest degree affect the sense of the section,[17] for treason is a breach of allegiance and it is well settled that every resident or sojourner within the United States, as well as every citizen, owes to the government a local allegiance, permanent or temporary, sufficient to subject him to the penalties of treason.[18] *Protectio trahit subjectionem et subjectio protectionem.*

In conclusion, it should be noted that Congress has also defined and penalized misprision of treason, or the bare knowledge and concealment of treason in others, without any degree of assent thereto,[19] thus accentuating the plain duty of everyone to expose treason and bring traitors to justice.

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THE LIABILITY OF A CARRIER FOR THE EJECTION OF A PASSENGER WHEN THE CARRIER FAILS TO FURNISH THE PROPER TICKET.—The common carrier of passengers is entitled to the compensation for the carriage of passengers before the completion of the journey, and, as the whole conduct of the business is built up on this right, it is necessary that it should be properly safeguarded. The almost universal method of enforcing this right is by ejecting from the train a passenger who refuses to pay the proper fare on the demand of the conductor. Accordingly, if the passenger wrongfully refuses to pay the proper fare, or is unable to pay it, the carrier may eject him from the train without incurring liability, thereby

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[13] Ex parte Bollman, *supra;* Case of Fries, *supra.*
[14] U. S. *v.* Vigol, Fed. Cas. 16, 621.
[15] Fed. Crim. Code, § 1, Rev. Stat. § 5331, U. S. Comp. Stat. '16, § 10165.
[16] Fed. Crim. Code, § 2, Rev. Stat., § 5332, U. S. Comp. Stat. '16, § 10166.
[17] U. S. *v.* Wiltberger, 4 Curtis (U. S.) 574, 5 Wheat. 76.
[18] Carlisle *v.* U. S., 83 U. S. 147.
[19] Fed. Crim. Code, § 3, Rev. Stat., § 5333, U. S. Comp. Stat. '16, § 10167.